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No. 90-1604

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

DAN MORALES,
ATTORNEY GENERAL OF TEXAS,
Petitioner,
v.

TRANS WORLD AIRLINES, INC., *et al.*,
Respondents

REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. The NAAG Guidelines are irrelevant to this case 1

2. Congress did not intend to deregulate all aspects of airline practices, nor did it intend to prevent parallel state regulation in the areas where it did not deregulate. 7

3. The extent of pre-emption urged by the airlines sweeps impermissibly and unavoidably broad. 9

4. There is no implicit pre-emption of state regulation of deceptive airline advertising 11

5. The pre-emption section does not apply to foreign air carriers. 16

CONCLUSION 17

TABLE OF AUTHORITIES

PAGE

CASES

Alaska v. U.S. Department of Transportation, 868 F.2d 441 (D.C. Cir. 1989) 12

Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) 14

Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478 (1990) 6

Mackey v. Lanier Collections Agency, 486 U.S. 825 (1988) 6, 10

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) 12

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) 6, 11, 14

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 6

Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990) 11

Wardair Canada v. Florida Dept. of Revenue, 477 U.S. 1 (1986) 12

West v. Northwest Airlines, Inc., 923 F.2d 657 (9th Cir. 1990) 14

Wisconsin Public Intervenor v. Mortier, 111 S.Ct. 2476 (1991) 11, 12, 14

PAGE

STATUTES

49 U.S.C. § 1301(3) 16

49 U.S.C. § 1302(a)(3) 16

49 U.S.C. § 1302(a)(7) 8

49 U.S.C. § 1305(a)(1) 7, 16

49 U.S.C. § 1381(a) 8

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REPLY BRIEF ON THE MERITS

Petitioner Dan Morales files this reply to the brief on the merits filed herein by the respondent airlines and to the several briefs filed by *amici curiae* in support of the respondents.

ARGUMENT

1. The NAAG Guidelines are irrelevant to this case.

In their brief, the airlines pretend that this case turns on something that it does not—narrow preemption of the NAAG Guidelines—rather than what it does—broad denial of the rights of the states to en-

force their own laws when airlines violate those laws.

The Court granted review of this case based on the question presented by the State:

> Can airlines falsely advertise air fares in Texas, in total disregard of state law prohibitions, merely because the federal government has pre-emptive regulatory authority over an airline's "rates, routes, or services" under the Federal Aviation Act?

Pet. for Cert. at i. In their brief, the airlines recast that question as:

> Whether section 105(a)(1) of the Airline Deregulation Act, which provides that "no State . . . shall enact or enforce any law . . . or other provision having the force and effect of law relating to rates, routes, and services of any air carrier," bars Texas and other states from enforcing detailed rules that specify what air carriers may and may not say when advertising rates.

Resp. Br. at i.

a. The airlines have recast the question before this Court because they apparently hope to deceive the Court about the facts of this case, just as they have deceived Texas citizens about the facts behind their fares. Recognizing the inherent weakness of an argument urging the pre-emption of general consumer protection laws, Resp. Br. at 23-24, the airlines now tell the Court that the only issue is the threatened enforcement of the NAAG Guidelines, and they rewrite the history of this case to support this revisionist theory.

For example, the airlines tell the Court that the district court "preliminarily enjoined the Attorney General of Texas, and also the attorneys general of thirty-three other states who had intervened as defendants, from *enforcing the NAAG Guidelines* in the guise of state consumer protection law." Resp. Br. at 13-14 [emphasis added]. This is false. In truth, the district court's preliminary injunction enjoined the attorneys general from:

> initiating any enforcement action pursuant to Tex. Bus. & Comm. Code §§17.41 et seq., or any other provision of state law, which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates, routes and/or services.

App. to Cert. Pet. at 50a. The permanent injunction was essentially the same; it barred the attorneys general from:

> initiating any enforcement action or actions pursuant to any provision of state law, which would seek to regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations involving their rates, routes and/or services.

App. to Cert. Pet. at 10a. Although both the preliminary injunction order and the final judgment granting the permanent injunction contained discussion of the NAAG Guidelines, App. to Cert. Pet. at 48a-49a and 9a, neither injunction was as narrow as the airlines now tell the Court. In truth, the injunctions enjoin enforcement of any state laws that "regulate or restrict any aspect of the individually named Plaintiff airlines' air fare advertising or their other operations

involving their rates, routes and/or services." App. to Cert. Pet at 9a.[1]

In another false statement to the Court, designed to bolster the argument that there is a live case or controversy relating to the NAAG Guidelines, the airlines say that Texas and other states wrote to airlines and "demanded that airlines 'bring their advertisements into compliance with the standards delineated in [those] guidelines.' " Resp. Br. at 15, quoting J.A. 123a.[2] In fact, the full quotation, contained in a

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1 The airlines also mislead the Court when they say that the other 33 attorneys general had "intervened as defendants," Resp. Br. at 13. In fact, the district court rejected the airlines' position that the other attorneys general be deemed intervenors, and instead permitted the airlines to amend their complaint to add those attorneys general as defendants, pursuant to F. R. Civ. P. 19. App. to Cert. Pet. at 60a. The Court of Appeals, while noting in dictum that "it appears to us that the thirty-three attorneys general became *de facto* intervenors," affirmed the order of the district court permitting the airlines to amend. App. to Cert. Pet. at 42a-43a. In its brief filed at the certiorari stage of this case, the United States advised the Court that the courts below clearly erred in these rulings, and recommended a summary reversal on this point. Br. for the United States as Amicus Curiae at 14-16.

2 The airlines repeat this false statement in at least two other places. Resp. Br. at 12 and 13.

In still another attempt to mischaracterize what Texas has done, the airlines claim that "the states make no secret of the fact that they intend directly to affect 'the terms and conditions of discount airline fares as well as the advertising of those fares.' App. C, *infra*, at 24a." Resp. Br. at 38. In fact, that quotation is contained in a letter *from* the Federal Trade Commission *to* a deputy attorney general in California, wherein the Commission says that the NAAG Guidelines *could* have such an effect. Far from being an admission by Texas or any other state, the quoted

memorandum from those states to airlines and other interested parties, says that *"most airlines are making a concerted effort to* bring their advertisements into compliance with the standards delineated in [those] guidelines." J.A. 123a [emphasis added]. That memorandum did say that "in the opinion of the states signing this memorandum, the failure to include any non-optional costs in the advertised price is *a violation of our respective state laws on deceptive advertising and trade practices.*" J.A. 123a [emphasis added]. Nowhere in this memorandum nor anywhere else in the record does Texas or any other state threaten to sue any airline to enforce the NAAG Guidelines. The states only seek to enforce their general consumer protection laws.[3]

b. Why do the airlines mischaracterize this case? They concede that the NAAG Guidelines are not law. Resp. Br. at 17. Here, they agree with the Court of Appeals. App. to Cert. Pet. at 15a. They also agree with the State, which has consistently attempted to turn the focus to the law and away from the NAAG Guidelines. Pet. Br. at 6.

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language is speculation by an agency opposed to what the states were doing.

The airlines' use of inaccurate and misattributed quotations belongs more in an advertisement for a mediocre movie than in a Supreme Court brief.

3 For further proof, see the suit Texas actually filed against Pan American World Airways, Inc., in Texas state court. J.A. at 189a-197a. This suit did not mention the NAAG Guidelines, but rather sought relief specific to Pan Am's deceptive advertisements pursuant to the Texas Deceptive Trade Practices Act. J.A. 191a-197a. That case was later removed to federal court and made a part of this case, over the objection of Texas. App. to Cert. Pet. at 43a-45a.

They mischaracterize in order to convince the Court that there is something to pre-empt, if the Court reads the pre-emption of the Federal Aviation Act to be as broad as ERISA pre-emption, as the airlines urge and the State opposes. Under ERISA, a state statute is pre-empted "if it has a connection with or reference to" an employee benefit plan. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). Therefore, the airlines argue, Texas law is pre-empted if it has such a connection with or reference to fares. Resp. Br. at 18. The Texas Deceptive Trade Practices Act does not meet either prong of this test. It has no connection with fares whatsoever—it is a general law against deceptive practices. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 fn. 11 (1988); *Mackey v. Lanier Collections Agency*, 486 U.S. 825 (1988). By the same token, it has no reference to fares. As well, the Texas law functions irrespective of the existence of the FAA and the presence or absence of federal regulation. *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 483 (1990). The Texas law does not fall within the scope of ERISA pre-emption.

But, indeed, the NAAG Guidelines do refer to fares, as the airlines correctly say. Resp. Br. at 18. They may also be construed as having a connection with rates, as the airlines urge. Resp. Br. at 18. Thus, if the Court can be made to believe that Texas sought to "enforce" the NAAG Guidelines *and* if the Court accepts the airlines' contention that ERISA pre-emption is coextensive with FAA pre-emption, then the airlines have found a bird's nest on the ground.[4]

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4 Of course, as discussed at length in the State's Brief on the Merits, at 33-36, ERISA is inapposite. But this point will not be repeated here.

Therefore, the airlines set about the task of convincing the Court that the question of pre-emption in this case arises from "the states' threatened enforcement of the new industry-specific standards contained in the NAAG Guidelines, not the routine enforcement of general consumer protection laws." Resp. Br. at 21. However, because all the states ever attempted is indeed the "routine enforcement of general consumer protection laws," the airlines have attempted the deception set forth above. This deception fails, as must the position it was intended to support.

The NAAG Guidelines have neither the force nor the effect of law, as the pre-emption section requires. 49 U.S.C. § 1305(a)(1). The Guidelines have never been presented as anything other than an extremely informal Restatement of Torts relating state consumer protection laws to airline practices, which "restate individual states' false advertising and deceptive practices statutes as they apply to air fare and price advertising," in order to "give an airline a reasonable expectation that it will not be sued if it follows the Guidelines. . . . If an airline does not choose this safe harbor and instead ventures into untested waters, it may run aground and it may not. But it is free to do so." Commentary to NAAG Guidelines, reprinted in App. to Br. for the United States as Amicus Curiae, at 18a and 15a.

2. Congress did not intend to deregulate all aspects of airline practices, nor did it intend to prevent parallel state regulation in the areas where it did not deregulate.

All of the many briefs filed in this case attempt, through a variety of approaches, to convince the Court what Congress set out to achieve in the

Deregulation Act. A corollary approach asks what Congress did not intend.

Of relevance to this discussion is the fact that Congress left untouched the authority of the federal agency to deal with "unfair or deceptive practices or unfair methods of competition." 49 U.S.C. § 1381(a). Congress did not intend to deregulate federal authority over these practices, or it would have had to revise this section.

Indeed, Congress even stressed its intent for federal authority to continue in this area, perhaps even with renewed vigor, in requiring the Board (now the Department) to consider, in the exercise of its powers and duties, the "prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation . . .." 49 U.S.C. § 1302(a)(7).

Congress thus expressed its intent that deceptive and anticompetitive practices continue to be regulated, rather than being left to market forces, as it intended with respect to controlling rates, routes, and services. At the same time, it gave no indication that it intended to take from the states their historic police powers to enforce their consumer protection laws relating to those deceptive and anticompetitive practices.

The airlines desire that the Court support the judicial activism that took place below, which went far beyond the express intent of Congress and encroached into an area that Congress explicitly chose not to deregulate.

3. The extent of pre-emption urged by the airlines sweeps impermissibly and unavoidably broad.

As discussed in the State's brief on the merits, Pet. Br. at 13, and in a brief of *amici*, Public Citizen Br. at 9-11, if one accepts the broad reading of the pre-emption section urged by the airlines, the sweep of that pre-emption is far broader than Congress could have intended. In an honest effort to answer this argument, the Solicitor General proposes that pre-emption can be limited in its sweep, even if one adopts the broad ERISA-type pre-emption. Br. for the United States as Amicus Curiae Supporting Respondents, at 17, 25, and 29.[5]

The Solicitor General says, first, that state laws prohibiting gambling, prostitution, or the sale of illegal drugs, tort actions arising from plane crashes, and the like, "do not relate to rates, routes, or services *in a manner implicating competition or the pro-competitive policies* of the Deregulation Act." *Id.* at 17 [emphasis added].[6] Later in its brief, the Solicitor General expands on this point, saying that the pre-emption section "was designed to preclude not only state laws reimposing the direct controls on rates, routes, and services that Congress abolished, but also laws relating to those matters that could *interfere*

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5 The airlines also allude to this argument. Resp. Br. at 16. However, because the United States makes the arguments in greater detail, those arguments will be discussed here.

6 This assertion itself ignores the fact that competition can unfortunately come in many guises. In fact, it is possible to conjecture that an airline which opened up its terminal locations to slot machines would draw certain passengers away from its competitors.

with the pro-competitive policies that federal authorities were directed by Congress to implement." *Id.* at 25 [emphasis added]. The highlighted portions of these arguments appear to depart from a strict construction of Congress' intent in adopting the express pre-emption section and to venture into a divination of Congress' implicit intent to pre-empt beyond the mere language of the Act. This is confirmed when the Solicitor General concludes that the pre-emption section "is fairly construed to *protect the pro-competitive regulatory judgments* mandated by the Deregulation Act's statement of policy from this type of conflict." *Id.* at 29 [emphasis added].[7]

The flaws in an implicit pre-emption argument are detailed in the next section of this brief. At this point, it must be stressed that there is nothing in either the Act itself or in the legislative history to suggest that Congress intended the meticulous line-drawing the Solicitor General suggests. Under the ERISA cases, if a state law relates to employee benefit plans, that is the end of the inquiry—that law is pre-empted, even if it appears to be consistent with ERISA's substantive requirements. *Mackey v. Lanier Collections Agency*, 486 U.S. 825, 829 (1988). So must the case be with respect to this Act, if the ERISA standard is applied. Texas believes that the extremely

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7 Perhaps it was to just those sorts of state regulatory actions that might "relate to" rates, routes, or services, but did not conflict with the Department's internal policy, that the Department had in mind when it wrote to a deputy attorney general in California. The Department's general counsel noted that, although some of the Guidelines appeared to be pre-empted, the Department had "no objection" to other Guidelines, and further urged the states "to continue to strive for non-misleading advertising." App. to Resp. Br. at 12a and 14a.

broad sweep of this variety of pre-emption argues strongly against the conclusion that this is what Congress intended. Congress certainly evinced no desire for a case-by-case consideration of the competitive impact of any given state law or the enforcement thereof.

4. There is no implicit pre-emption of state regulation of deceptive airline advertising.

The court of appeals relied on the express pre-emptive effect of the FAA's pre-emption clause and did not reach the question of implied pre-emption. App. to Cert. Pet. at 34a.

As an initial principle, the Court should confirm that it is both unnecessary and inappropriate to search for additional implicit pre-emption when Congress has expressly ordained limited statutory pre-emption. The inquiry should begin and end at the language of the statute. After the scope of the explicit statutory pre-emption is established, for a court to go looking for possible additional implicit pre-emption outside the statute does violence to the presumption against pre-emption. Once Congress has spoken, it is inappropriate for courts to attempt to go beyond what Congress ordained. The Court has frequently said that one looks for possible implicit pre-emption *in the absence of* explicit statutory language. *E.g., Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2481 (1991); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988). The Court should now affirm that one looks for implicit pre-emption *only* in that absence.

However, both the airlines and several of the *amici* argue for implicit pre-emption, based on

asserted conflicts with federal law.[8] Therefore, the State will reply to these claims. The prior opinions of the Court relating to implied pre-emption shows that there is none in this case.

In the absence of express pre-emption, Congressional intent to supersede state law may be implied when (1) Congress has chosen for the federal government to occupy a particular field or (2) state and federal regulations actually conflict. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2481-2482 (1991) and cases cited therein.

Congress has indicated that it did not intend to occupy the entire field of airline regulation. *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. 1, 6 (1986); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 301 (1976). Otherwise the pre-emption clause and the saving clause would be meaningless surplusage. *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2486 (1991).

As well, there is no impossible conflict between state and federal regulation. There is no conflict created by either (a) compliance with both state and federal law or (b) state law creating an obstacle to the federal purpose.

a. As discussed in Pet. Br. at 20, the current federal regulations are virtually identical to the enforcement position taken by Texas. Even if the DOT regulations invalidated in *Alaska v. U.S. Department of Transportation*, 868 F.2d 441 (D.C. Cir. 1989), dis-

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8 *E.g.*, Resp. Br. at 40-46; Br. of the United States as Amicus Curiae Supporting Respondents at 24-29; and Br. of the American Association of Advertising Agencies, Inc. *et al.*, as *Amici Curiae* in Support of Respondents at 18-23.

cussed in Pet. Br. at 27, were to be the law, there would still be no problem with complying with both Texas law and less-stringent federal regulation.

As to the only matters on which there is a true case or controversy—whether or not surcharges can be excluded from the advertised fare—no airline is put to the pain of complying with state law only by violating federal law. For example, in the advertisement that formed the basis of the State's suit against Pan Am, the airline had advertised a $149 fare to Europe and other destinations. J.A. 192a. In fact, the $149 advertised fare was for only one way of a required round-trip purchase, and surcharges totalling an additional $23 were omitted from that price, and were only disclosed in the fine print of the advertisement. J.A. 193a. Therefore, the actual cost of the ticket was $321. The State of Texas interprets its consumer protection law (not the NAAG Guidelines) to require disclosure of the full $321 fare. The Department of Transportation has stated that its enforcement policy would permit what Pan Am had done. Brief for the United States as Amicus Curiae Supporting Respondents at 27-28.[9]

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9 The Department has also proposed to reverse the existing federal regulation, which prohibits practices of this nature, to permit such practices. However, nearly three years after proposing this turnaround, the Department has still not made the proposal a final, and appealable, regulation. *See* Pet. Br. at 27. The airlines insist on treating this proposed change as though the rulemaking requirements of the Administrative Procedure Act were a nullity and these proposals were now the law. Resp. Br. at 43-44. They are not the law and should not be understood as such. The airlines' reliance on this proposed regulation, as a basis to find conflict pre-emption, is simple grasping at straws.

The airlines can easily comply with both standards, merely by disclosing the full $321 fare. Neither the Department's informal enforcement policy nor its proposed regulation prevent full disclosure—they merely do not mandate it. There is no "impossibility of dual compliance" requiring pre-emption. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Wisconsin Public Intervenor v. Mortier*, 111 S.Ct. 2476, 2482 (1991).[10]

b. In addition to an impossible conflict of laws, a second variety of conflict pre-emption will be found "where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300 (1988). The test is "whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives." *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

As discussed in Pet. Br. at 11-13, the state law fulfills Congress' intent to have a fully-competitive marketplace. In addition, the current federal law and state law are complementary, Pet. Br. at 19-28, despite the Department's decision not to enforce current regulations, Pet. Br. at 27.

c. Although the airlines and the *amici* make much of the conjectured reduction in fare advertising if the states are not pre-empted, *e.g.*, Resp. Br. at 37, this argument fails for two reasons. First, the argument is based on the insistence that every NAAG

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10 The Ninth Circuit reached similar conclusions in *West v. Northwest Airlines, Inc.*, 923 F.2d 657, 661 (9th Cir. 1991), *petition for cert. pending*, No. 91-505.

Guideline will be forced upon the airlines with respect to every advertisement. As discussed above, in Section 1, the Guidelines are not mandatory law, but only suggestive of ways in which airlines may comply with state consumer protection laws, and Texas has never required any airline to comply with any Guideline. All this case is really about is the right of Texas to insist that an airline disclose the full fare a customer must pay, when the airline *chooses* to advertise a fare, as required by state law.

Second, this conjectured ill effect ignores the fact that some airlines did include all surcharges in their advertised fares for virtually all of 1988 with no apparent reduction in fare advertising. J.A. 118a and 123a. If this real-world test of the airlines' hypothesis had proven that hypothesis correct, it is reasonable to assume that the airlines would have brought that into the record in this case. Since the real world disproved the airlines' hypothesis, they now merely restate the hypothesis and hope that imagination will succeed where reality did not.[11]

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11 Because the district court entered its preliminary injunction after a brief, non-evidentiary hearing, the record contains no testimony. The State sought a stay of proceedings, to enable it to prepare, but this stay was not granted. The only evidence in this case consists of affidavits whose authors were not subject to cross examination. For this reason, the record facts that are actually before the Court are sketchy at best. Texas brings such facts as exist to the Court's attention, but does not wish to suggest that any of these facts are dispositive.

The fact that the district court granted a preliminary injunction after a non-evidentiary hearing that was to be limited to consideration of a temporary injunction only, Tr. at 14:19-15:14, serves to underscore the radical judicial activism of the courts below.

Once one gets past the roadblock of express pre-emption, implied pre-emption is no more than a speed bump over which one may cautiously but safely pass.

5. The pre-emption section does not apply to foreign air carriers.

The foreign air carriers are improperly before the Court. The pre-emption section applies only to "air carriers." 49 U.S.C. § 1305(a)(1). An "air carrier" is defined as "any citizen of the United States, who undertakes . . . to engage in air transportation . . .." 49 U.S.C. § 1301(3). A "foreign air carrier" by contrast is separately defined as "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." These two terms are mutually exclusive and are terms of art. Elsewhere in the Act, Congress refer to both "air carriers" and "foreign air carriers" in another section relating to deceptive practices. 49 U.S.C. § 1302(a)(3). The pre-emption section, on the other hand, does not mention and therefore does not apply to foreign carriers.

This distinction is logical when one considers Congress' intent to prevent the states from engaging in utility-type regulation of airlines, after deregulation. Before 1978, states had tried to set rates for domestic "air carriers" but had never attempted or intended to set the rates of "foreign air carriers." Because there was no past history of state activity with respect to foreign air carriers, and thus no need to invoke the extraordinary effect of pre-emption, Congress wisely chose to limit the effect of the pre-emption section to domestic "air carriers."

The foreign air carriers cannot use the pre-emption section to establish either federal court jurisdiction or a federal-law-based claim, and are thus improperly included in this suit.

This results, if one accepts the airlines' construction of the pre-emption section, in the fully-anomalous result that foreign air carriers are subject to state consumer protection laws, but not domestic air carriers. Congress could not have intended this result.

CONCLUSION

Arguments can be made on both sides of the pre-emption issue before the Court, and these arguments have in fact been made, at length and in near-infinite variety. All arguments reduce to one point, whether or not sound public policy as determined by Congress favors pre-emption of state authority to enforce state consumer protection laws when confronted with specific acts of deception by airlines. The variety of arguments should drive home one point—Congress has not unmistakably ordained one specific course for the Court to follow. Texas urges that the better choice in this event is to choose the course that does no harm to federalism, by permitting the state the narrowly-crafted enforcement of its laws which it would do, and not to preclude the state from enforcing its laws, based on the speculations and mischaracterizations of the airlines herein.

For the reasons stated herein and in petitioner's brief on the merits, the judgments of the courts below should be reversed.

Respectfully submitted,

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